BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Statement.

A statement of the essential facts has been incorporated in the petition and will not be repeated here.

Grounds for Jurisdiction.

1. United States Circuit Court of Appeals for the Seventh Circuit has by its decision affirming the judgments in the case at bar so far sanctioned a departure by the lower court from the accepted and usual course of judicial procedure as to call for an exercise of this court of its power of supervision.

2. The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

Specification of Errors.

1. The closing argument of the plaintiffs to the jury constituted prejudicial error which precluded the possibility of a fair trial on the issues.

2. The admission by the trial court of the defendant's arrest, incarceration and prosecution following the accident in question constituted error of such a prejudicial nature as to preclude the possibility of a fair trial upon the issues.

ARGUMENT.

I.

The closing argument of the plaintiffs to the jury constituted prejudicial error which precluded the possibility of a fair trial on the issues.

The closing argument to the jury by plaintiffs' counsel, objected to by the defendant, was in part as follows (Tr. 294):

> "Mr. Ryan: * * * And then they come in with this dishonest, miserable, unfair, untrue defense—
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> Mr. Sears: I object to the remarks, 'dishonest, miserable, unfair, and untrue defense.'
>
> Mr. Ryan: That is all it can be characterized.
>
> Mr. Sears: I object to that, your Honor.
>
> The Court: Wait a minute. He has a right to discuss the evidence to the jury and draw his conclusion, and they will pass on what it is.
>
> * * *
>
> Mr. Ryan: He hasn't fairly discussed the damages, and he hasn't told you why this lady should not receive substantially everything that was asked for in this case. I say this whole defense is untrue. I am not seeking sympathy. You use your good common sense and judgment, and analyze the evidence, treat this little lady from a sister state the way you would want to be treated if you were a party to this litigation, and the lawyers will have to be satisfied. This whole defense, I say, is a lie, and it makes one's blood boil to have to sit here and listen to it—
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> Mr. Sears: I object to these inflammatory remarks in front of the jury.
>
> The Court: Proceed.
>
> Mr. Ryan: I say that a lie won't fit into anything but another lie, and that is why you can't get away with a lie. * * *"

The purpose of an argument to the jury is to lend assistance to a correct result. Yet, it can hardly admit of question, that the foregoing argument was calculated only to prejudice the jury against the defendant. It is a blanket indictment of all the witnesses for the defendant and a direct accusation that each and all of them committed perjury. To tell a jury that a defendant came in with a "dishonest, miserable, unfair, untrue defense" and that the entire defense is "a lie" and that "it makes one's blood boil to have to sit here and listen to it" and "that a lie won't fit into anything but another lie" is certainly not calculated to aid the jury in a consideration of the evidence. Particularly is this true when it comes in a closing argument to the jury with a defendant unable to answer it and utterly helpless to do anything about it but object and where in addition it receives at least a tacit consent of the court by the overruling of the objections.

Now, what was this "dishonest, miserable, unfair and untrue defense"? In this case there were ten witnesses who testified for the defendant, including the defendant himself. With respect to the question of liability four of them (Baker, Tr. 154; Kiefer, Tr. 174; Mahoney, Tr. 159; and Sorenson, Tr. 164) testified that in their opinion the defendant was sober and not drunk. Two of them, Kiefer and Sorenson, saw the defendant at the scene of the accident, and the other two a short time before when he drove up to have his wheel repaired. These witnesses had absolutely no interest in the controversy and took oath before the jury that they would tell the truth. The defendant denied that he was drunk and testified that he was sober when the accident occurred (Tr. 188).

That the defendant was operating his motor vehicle in a proper manner within the west-bound traffic lane

of the highway is best shown by the testimony of the plaintiff Orland Heald himself. He testified that he first saw the defendant's car when it was between fourteen hundred and fifteen hundred feet—more than a quarter of a mile—away (Tr. 121, 147). His car and the defendant's car were the only two cars in sight (Tr. 121). There was nothing out of the ordinary about the defendant's car that attracted his attention when he first saw it in the distance coming toward him (Tr. 127, 147). In addition plaintiff Martha Heald testified that she saw the defendant's car before the collision (Tr. 113) and she noticed it as she would notice any other car approaching. The defendant himself testified that he was traveling within his proper traffic lane (Tr. 187, 198).

The physical facts attending the collision are not in conflict. As defendant's car stood by the north culvert abutment after the collision the left rear wheel was missing (Tr. 18, 72, 90). The wheel was in the field one hundred feet north of the culvert and about twenty-five feet east of it (Tr. 68, 72, 83-84). There was no damage to the fence nor did it bear any tire marks (Tr. 84). There were marks in the field beginning directly north of the culvert ten feet beyond the fence into the field and ending where the wheel lay (Tr. 84-85). The wheel itself bore no marks of damage nor did the tire, which was inflated.

The defendant's car was the type on which each wheel is perforated by six holes arranged in a circle around the center of the wheel and the wheel is fastened to the axle drum by nuts. After the accident the nuts on defendant's left rear wheel were still on the bolts extending from the left rear axle drum (Tr. 106, 107, 108). The holes in the wheel were worn but undamaged (Tr. 108, 165) and the nuts used to clamp the wheel to the

axle drum could be passed through the holes (Tr. 108-109, 165) (for illustrations see defendant's Exhibit 1, Tr. 349).

The plaintiff Orland Heald testified that when the two cars were seventy-five or eighty feet apart the defendant's car veered over to the south side of the highway directly toward his car (Tr. 113) and the collision happened very suddenly (Tr. 145). The defendant testified that when the two cars were a short distance apart the back end of his (defendant's) car suddenly dropped (Tr. 186, 199-200).

Now, on the basis of this evidence, the question of the defendant's drunkenness was a fact issue. Certainly there was evidence on both sides. Secondly, it was the theory of the defense that even if the defendant was drunk on the occasion in question, there was no liability for that in the absence of negligence. And there is respectable authority for that proposition. *Wise* v. *Schneider,* 205 Ala. 537, 88 So. 662; *St. L., S. F. T. Ry. Co.* v. *Morgan* (Tex. Civ. App.), 220 S. W. 281; *Cleveland Ry. Co.* v. *Owens,* 51 O. App. 53, 199 N. E. 607; *Powell* v. *Berry,* 145 Ga. 696, 89 S. E. 753; *Sylvester* v. *Gray,* 118 Me. 74, 105 Atl. 815; *Simensky* v. *Zwyer,* 40 O. App. 275, 178 N. E. 422; *Bates* v. *Tirk,* 177 Wash. 286, 31 Pac. (2nd) 525; *Strang* v. *City of Kenosha,* 174 Wis. 480, 182 N. W. 741.

Thirdly, it was the theory of the defense that the proximate cause of the accident in question was the fact that the wheel came off and threw the defendant's car across the center line. There is no question but that the wheel came off and certainly the physical facts of the accident corroborate the defendant's testimony that it came off before the car lurched across the center line of the highway.

If that defense is dishonest, miserable, unfair, untrue and is a lie which will fit into nothing else but another lie causing counsel's blood to boil, then how do plaintiffs account for paragraph seven of Count I (Tr. 4) and paragraph six of Count II (Tr. 6) of their complaint, which charge the very same thing—that is, that the defective wheel becoming detached from the automobile caused the automobile to run onto the left side of the highway and come into collision with the plaintiffs' automobile.

The theory of the plaintiffs and the defendant is identical on this point as to the cause of the accident, the only difference being that the plaintiffs contend that the wheel came off by reason of negligence in inspection of the car, whereas the defendant contends that the inspection was adequate and the wheel came off without any fault on his part.

The plaintiffs in setting up that charge in the complaint anticipated, before the proceeding was filed and before the defendant had said anything, the possibility that their own proof would establish that the cause of the accident was the defective wheel coming off of the car. Yet, when the proof so shows, it becomes a "dishonest, miserable, unfair, untrue defense which will fit only into another lie."

Moreover, the plaintiffs contended on the trial that there was insufficient inspection of the car and that theory was presented to the jury. The Circuit Court of Appeals in its opinion stated that there was sufficient evidence to justify a recovery on that theory (Tr. 397-398).

The car had been inspected at the time it came into defendant's possession a week or ten days before the accident (Tr. 243). About two hours before the collision the defendant drove this car to the Oldsmobile

Garage in LaGrange, Illinois, where he asked a mechanic to investigate a creaking noise in the rear end of the car, which he demonstrated to the mechanic by driving his car backward and forward across the yard (Tr. 153, 158, 183). The mechanic located the noise in the left rear wheel (Tr. 155) removed the hub cap and tightened the nuts on that wheel with a wrench, all of which were loose about one turn (Tr. 153, 155, 158, 183). The mechanic by having the defendant drive backward and forward four or five times showed that the noise was eliminated (Tr. 154, 159, 194). The mechanic then told the defendant that the car was in proper shape (Tr. 154) and defendant did not detect a loose wheel at any time thereafter (Tr. 195).

It is a well settled rule that where a reasonable inspection fails to disclose a defect, the owner is not liable for injuries to other motorists on the public highways resulting therefrom. (*Delair* v. *McAdoo,* 324 Penn. 392, 188 Atl. 181; *Bolin* v. *Corliss Co.,* 262 Mass. 115, 159 N. E. 612; *Sennett* v. *Nonantum Coal Co.,* 284 Mass. 390, 187 N. E. 758; *Ormond* v. *Wisc. Power & Light Co.,* 194 Wisc. 305, 216 N. W. 489; *Cherry Lake Farms, Inc.* v. *Taylor,* 98 Fed. (2nd) 571.) This seems to be respectable authority for that proposition. Is it then dishonest, miserable, unfair and untrue to contend that the inspection and repair of the car by the defendant on two different occasions constituted reasonable and ordinary care and that what defendant did was what the ordinary reasonable man would do?

On the question of damages the evidence was very sharply in dispute. The plaintiff, Martha Heald, sued for $25,000.00 and Orland Heald for $10,500.00, and both claimed serious and substantial injuries. The plaintiff, Martha Heald, appeared in court on crutches, which both of the defense doctors, Conley (Tr. 226)

and Zeitlin (Tr. 274), testified to be unnecessary. Both of these doctors are outstanding men in their profession, Conley being the head of the orthopedic department of Oak Park Hospital and Chicago Memorial Hospital, and until the first of 1940 was head of the orthopedic surgery department at Cook County Hospital (Tr. 213). It goes without saying that a man does not attain such rank in his profession unless his ability and integrity is outstanding. Conley had examined both plaintiffs in advance of trial pursuant to order of Court under the applicable federal rule (Tr. 214). The question of plaintiff, Martha Heald's fractured acetabulum and whether the injury was permanent depended almost entirely upon X-ray interpretation, and Dr. Zeitlin is one of the outstanding men in Chicago on that subject, starting in 1924 in the Research X-ray department of Michael Reese Hospital and for five years in the X-ray department of Cook County Hospital, and in 1926 and again in 1932 attended the post-graduate X-ray school at the University of Vienna (Tr. 267). Was it dishonest, unfair and miserable for these doctors to testify as they did, one after an examination of the plaintiff and the other on the examination of the X-rays? And was it dishonest, unfair and miserable to contend on the basis of the testimony of these eminent orthopedic surgeons that the injuries were not as great as the plaintiffs would have the jury believe?

We have extended these remarks about the witnesses and the evidence so that this court might get a better view of the accusations leveled against everyone connected with the defense of this case by the plaintiffs. Obviously, the argument in question was not based on the evidence and was not an interpretation thereof, although the trial court and the Circuit Court of Appeals seemed to think that it fell in the category of infer-

ences drawn from the evidence by counsel. It is true, as the Circuit Court of Appeals says, that the evidence was not misquoted. The evidence was not referred to at all and there was not even an attempt to justify the accusation on the basis of the evidence.

The argument did not point out why any particular witness or all of the witnesses should be disbelieved; it did not show that any of the witnesses had been impeached by inconsistent statements; that their reputation for truth and veracity was bad; that they were interested in the outcome; that they were biased, that they were related to the defendant, or that they did not have the opportunity for seeing or knowing the things about which they testified. Neither did the argument point out with respect to any items of the evidence why it was improbable, why it was incredible, or why it was outweighed by other evidence. The argument was simply an accusation that all the witnesses for the defendant blandly came forth and for a consideration, or otherwise, testified out of the whole cloth. They were the principal actors in the "dishonest, miserable, unfair and untrue defense" although it is not clear who is meant by "then *they* come in with this dishonest, etc. defense." The statement certainly is broad enough to include counsel for the defendant.

This was not an easy case to defend in any event. The average juror is prejudiced against any motorist where there is testimony that he was under the influence of liquor. As a matter of fact most of us are. It is apparent that the language of plaintiffs' counsel in his closing argument to the jury might well fall upon sympathetic and approving ears. It is difficult for the jury under such circumstances to bear in mind the fact that there is no liability for intoxication where the intoxication does not cause the damage. But this was a

court of law, where the defendant, drunk or sober, was entitled to a fair and impartial trial on the evidence. It would seem that under the circumstances the greatest of care and circumspection in the handling of the case would be indicated for the plaintiffs in the place of the reckless abandon which was exhibited. And by these statements we do not mean to imply any criticism whatsoever of the trial court, for whose integrity and ability we entertain the highest regard.

In *New York Cent. Ry. Co.* v. *Johnson*, 279 U. S. 310, 49 Sup. Ct. 301, plaintiff's counsel in the argument to the jury in very violent language made repeated references to an infamous disease. The argument was based upon the assertion that the defense claimed that plaintiff's injuries were due to such disease. The line of inquiry had been opened up by the cross-examination on behalf of the defendant but nothing was developed, it was abandoned and the defense disclaimed the point. In discussing the propriety of the remarks of plaintiff's counsel, this court held that the cross-examination was within the rights of the defendant and stated, page 317:

> "However ill advised, counsel for petitioner was within his rights in following this line of inquiry and even if it be assumed that the situation was one calling for comment on the evidence so elicited, neither petitioner nor its counsel was on trial for pursuing it."

So here. We believe that the only explanation for the collision in question was that it was proximately caused by the wheel coming off the defendant's car. Even if that were not so, certainly the defendant was within his rights in asking an opportunity to be heard in a dispassionate manner according to established rules of law and procedure. As was said in the *Johnson* case cited above, in the case at bar neither the defendant nor his counsel nor the witnesses who testified for the defend-

ant were on trial for asking for an opportunity to be heard and certainly this is not a ground for a verdict in the plaintiffs' favor or for enhancing it. Moreover, in the *Johnson* case, the question was not saved for review, but this court held, page 318:

> "The public interest requires that the court, of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by appeals of counsel to passion or prejudice."

It was also complained of in *New York Central Ry. Co.* v. *Johnson,* 279 U. S. 310, 49 Sup. Ct. 301, that in the argument plaintiff's counsel asserted, among other things, without supporting evidence, that the defense was a "claim agent defense." In discussing these remarks, this court stated, page 319:

> "Such remarks of counsel and others of similar character all tending to create an atmosphere of hostility toward petitioner as a railroad corporation located in another section of the country, have been so often condemned as an appeal to sectional or local prejudice as to require no comment."

In *Rouse* v. *Burnham,* 51 Fed. (2nd) 709, the defendant and appellant, who was a practicing physician, was called a "crooked doctor," that his "word was worth nothing." Another appellant, Greggory, was referred to as having "all the earmarks of a common, ordinary, enthusiastic liar." Of another, Dawson, plaintiff's counsel stated that he "lied on the witness stand." Of all of the witnesses for the appellants, plaintiff's counsel stated that "they come on the witness stand and every last one of them perjures himself in order to save these rascals and scoundrels a few dollars, every last one of them." In holding these remarks in an argument to the jury to be reversible error, the Tenth Circuit said on page 713:

> "We find nothing in the record to justify these remarks, and, if they had been true, they were not matters for consideration by the jury. There was no rebuke at any time from the court, and the jury must have thought that the argument was an appropriate one, else the court would not have permitted it. The verdicts of the jury in the total sum of $24,000.00 is evidence of aroused prejudices against the defendants. Conduct of plaintiff's counsel was not only improper, it was reversible error. It is the duty of the court of its own motion to protect litigants from abuse by opposing counsel. *New York Cent. R. R. Co.* v. *Johnson,* 279 U. S. 310, 318, 49 S. Ct. 300, 73 L. Ed. 706."

In *Mattic* v. *Klowans,* 312 Ill. 299, an attorney in his argument to the jury remarked that a certain physician testified as he did for the defense because the defendant's counsel "got to him first." The court held that the argument inferred that the doctor gave biased testimony because the defendant had influenced him and held the remark to be prejudicial error. See also *C. & A. R. R. Co.* v. *Scott,* 232 Ill. 419, 421, 422; *Bishop* v. *Chicago Junction Ry. Co.,* 289 Ill. 63, 69; *Appel* v. *Chicago City Ry. Co.,* 259 Ill. 561, 567, 568; *Crosby* v. *Minneapolis St. P. & S. S. M. Ry. Co.* (N. D.) 237 N. W. 803, all to the same effect.

In *Norfolk & W. Ry. Co.* v. *Eley,* 152 Va. 773, 148 S. E. 678, in his closing argument to the jury plaintiff's counsel said that the witness for the railroad company, being an employee of the railroad company and being charged with fault, would not testify any other way than the way that they did because of the fear and apprehension of discharge and suspension and that a person charged with fault always denies it. The court held that there was no evidence in the record justifying the assumption that the witnesses testified under the influence of the desire to retain their positions, that the

accusation was a direct impeachment of their integrity and witnesses could not be impeached in that manner. The court further held that it was impossible to measure the harmful effect upon the jury of the statement, not as a matter of opinion but as a matter of fact that the "bread and meat" of the witness and his family were dependent upon the giving of false testimony.

In that case it was further held that the failure of the trial court to sustain an objection to the remarks added further prestige to the statements and caused further harm. In this regard the court says (148 N. E. on page 679):

> "In addition to the great weight which the jury must have attached to the statement of the learned counsel that the alleged false testimony was the result of necessity is superadded the prestige of the court in giving its approval to the language employed. There is no legal tape with which we can measure the resultant harm when counsel wander too far outside the record. The harshness of a verdict in a criminal case or the exorbitant amount of damages awarded in a civil case may be the criterion applicable to a particular case, but this rule is not exclusive. When it is made to appear that a litigant has not been afforded a fair and impartial trial, this court will overlook technical refinements and remand the case for a new trial."

This court has held the same in the case of *New York Cent. Ry. Co.* v. *Johnson*, 279 U. S. 310, 49 Sup. Ct. 301, referred to above herein. In that case this court says, page 318:

> "Such a bitter and passionate attack on petitioner's conduct of the case, under the circumstances tending to stir the resentment and arouse the prejudice of the jury should have been promptly suppressed. The failure of the trial judge to sustain petitioner's objection or otherwise to make certain

> that the jury would disregard the appeal could only have left them with the impression that they might properly be influenced by it in rendering their verdict and thus its prejudicial effect was enhanced." (Citations omitted.)

So here. The effect of the objections to the argument being overruled by the trial court, while not intended to do so at all, could have only the effect of lending the court's prestige to the statement and conveying to the jury the thus enhanced opinion that the defense was "dishonest, miserable, unfair and untrue" that it was a lie which would not fit into anything but another lie and that the blood of plaintiff's counsel boiled justifiably upon being compelled to sit and listen to it.

In addition plaintiffs' argument (Tr. 294) also requested the jury to "treat this little lady from a sister state the way you would want to be treated if you were a party to this litigation and the lawyers will have to be satisfied." There was only one "little lady from a sister state" and that was the plaintiff Martha Heald. This certainly is a direct invitation to the jury to put themselves in the position of the plaintiff and then the gentlemen who are conducting the "dishonest, miserable, unfair and untrue defense" will have to be satisfied with the result accruing from the jury taking the side of the plaintiff. Obviously, this is an appeal to the sympathy of the jury and an effort to prejudice the defendant. Such arguments have been repeatedly held to be improper. *Thomas* v. *Ill. Power & Light Corp.*, 247 Ill. App. 378, 388; 64 C. J. 280, Sec. 298, n. 47(a), and cases cited.

Under the authorities cited the argument in question constitutes reversible error and we respectfully submit that it is such a departure from the accepted and usual course of a judicial procedure as to call for an exercise of this court's power of supervision.

II.

The admission by the trial court of the defendant's arrest, incarceration and prosecution following the accident in question constituted error of such a prejudicial nature as to preclude the possibility of a fair trial upon the issues.

During the testimony of the witness James J. Smith, a constable who came upon the scene of the accident shortly after the occurrence, he was asked upon direct examination for the plaintiff to state whether or not the defendant was then intoxicated. His answer was that in his opinion the defendant was intoxicated. Thereupon the following occurred (Tr. 20, 21):

> "Q. Did you take any action about the condition of this man Milburn?
> Mr. Sears: I object.
> Mr. Ryan: Q. Did you do anything about him when you took him to the jail?
> Mr. Sears: We object to that.
> The Court: Objection sustained.
> Mr. Sears: And we move for leave to withdraw a juror because of the prejudicial effect of the question. It can only lead to one inference.
> The Court: Objection overruled."

While the court was right in sustaining the objection the inference was there, and counsel should have at least refrained from any further inquiry on that point in view of the court's ruling. But that is not what transpired at all. Harry Crawford, a Deputy Sheriff of Kane County, was called by the plaintiff, and the following occurred (Tr. 29):

> "Q. And where were you located?
> A. In the Kane County jail, Geneva, Illinois.
> Q. Were you there in the afternoon when Mr. Smith came there with Mr. Milburn?
> Mr. Sears: I object to this type of evidence.

The Court: Overruled.

A. I was.

Q. Were you there in the afternoon when Mr. Smith came there with Mr. Milburn?

Mr. Sears: I object to this type of evidence.

The Court: Overruled.

A. I was.

Mr. Ryan: Q. About what time did Mr. Smith bring Mr. Milford there?

A. Oh, it was shortly—

Q. Milburn, rather.

A. Shortly after three o'clock.

Mr. Sears: I object to this, your Honor, on the ground you cannot show this matter in a civil proceeding, and, on the further ground, that we were taken by surprise on the evidence of this sort as not being within the scope of the pleadings.

Mr. Ryan: Your Honor, I object to the statement that counsel is taken by surprise, and move it be stricken.

The Court: Your objection will be overruled." (Tr. 30.)

"Mr. Ryan: Q. Mr. Crawford, did you have any conversation with Mr. Milburn, did you get close to him, and tell us what your contact, if any, was with him when he came into the jail?

A. Well, the radio operator in the jail there is, you might say, like a desk sergeant would be in the City of Chicago and other large cities. When they bring a person in he usually books him.

Mr. Sears: We object to this evidence as not responsive to the question.

The Court: Yes, objection sustained.

Mr. Ryan: Q. I don't know whether—Mr. Crawford, perhaps you didn't understand. My question may not have been plain. Will you tell us what conversation you had with Mr. Milburn when you saw him and got close to him? Tell us about this.

A. They brought him into the jail there and sat him down.

Mr. Sears: I object. It is repeated and repeated.

The Court: No. The question is, I presume to describe him."

Notwithstanding our objection, the evidence is nevertheless before the jury that the defendant was arrested by Smith, taken to the Kane County jail at Geneva and booked. This court can well appreciate the effect such testimony has upon the jury which is to consider the issue of the defendant's intoxication when it appears clearly that immediately after the accident he was arrested and brought to jail.

To offset the prejudicial effect of this inadmissible evidence and to rebut the inference to be drawn from the evidence, we thereupon inquired to determine whether the defendant had ever been tried on the charge (Tr. 188). The defendant, however, was not permitted by the court to state that he had never been tried upon the charge of driving a car while intoxicated on the ground that his testimony was not the best evidence. Notwithstanding such ruling the defendant on examination was interrogated by plaintiffs' counsel with respect to his being taken before a Justice of the Peace, that he waived examination, was bound over to the Grand Jury, required to furnish bond, and that the case was finally *nolle prossed* by the State's Attorney (Tr. 203); and the attempt was further made to establish that the action of the State's Attorney in discontinuing the charge was the result of a charitable action of the plaintiffs, as follows (Tr. 203):

> "Q. And you knew the reason for that was that Mrs. Heald—
>
> Mr. Sears: Just a minute, now, we object to this sort of cross-examination. The record is the best evidence and we can't impeach the record.
>
> The Court: He may ask that question.
>
> Mr. Ryan: Q. Don't you know, sir, that upon advice of their attorneys that Mr. or Mrs. Heald did not want to take any part in your prosecution on the criminal charge, that they were advised by their attorneys not to do it, and that they had no idea of being vindictive about this thing at all?

Mr. Sears: We object to the form of the question.

The Court: The form of the question is bad. The form is bad.

Mr. Ryan: Q. Well, the state's attorney did *nolle prosse* the case?

A. Yes."

The question was never answered, of course. Yet, the long statement by counsel is in the record and the inference is plainly made that the action of the State's Attorney was taken at the direction of the plaintiffs.

We thereupon produced the Clerk of the County Court of Kane County and offered in evidence the original record showing that the case had been *nolle prossed* by the State's Attorney (Tr. 206, 207, 208). This was, in fact, an information started by the State's Attorney in the County Court of Kane County on the charge of driving while intoxicated after the bind-over to the Grand Jury.

Nevertheless, plaintiffs' counsel in an apparent effort to leave the jury with the impression that other criminal prosecutions were pending against the defendant (which was not the fact) cross-examined the deputy clerk (Tr. 208, 209) in an attempt to show that he was the clerk only of the County Court, that the Grand Jury was an official body of the Circuit Court to whom the defendant had been bound over, that his testimony related only to the County Court proceeding, and that he knew nothing about what had transpired either in the Justice Court or the Circuit Court (Tr. 208, 209). Immediately thereafter the following colloquy occurred which further establishes the hope that the jury should infer other proceedings were pending (Tr. 210):

"Mr. Sears: I want to clarify it, Mr. Ryan wants to leave the impression there are still some proceedings pending against him.

Mr. Ryan: No, I want to leave the impression as to what was done in this case. You seem to want to invade the—

Mr. Sears: You will agree that there are no proceedings pending out there?

Mr. Ryan: I am not making any agreement with you. The record shows the state's attorney entered a *nolle prosse* and that is all.

The Court: Are you through?

Mr. Sears: That is all."

Not satisfied with such status of the record, the plaintiffs came back in rebuttal and sought to leave the impression with the jury that the dismissal of the criminal prosecution by the State's Attorney was the result of their charity, and that the action of the State's Attorney was taken because they did not desire any prosecution (Tr. 281, 282). Although at this time an objection was sustained, nevertheless there is no doubt that through the constant repetition and reiteration the jury were left with the inference that the defendant was so drunk that he was promptly arrested, and only through the intervention of the plaintiffs was he saved from a just punishment.

Then to really impress the jury that the criminal prosecutions were important right at the close of the plaintiffs' case they offered in evidence the state warrant, the complaint and *capias* (Tr. 282). In view of the trial court's rulings no objection was made by the defendant inasmuch as an objection would only have the effect of impressing still further on the minds of the jury the probable importance of the documents in question. To sum up the situation, the record shows that in the first instance, when it was attempted by the plaintiffs to prove the arrest, and the fact that the defendant was taken to jail, the court sustained the objection. But it is all before the jury, nevertheless.

It was bad enough to have to try the present case without having also to try the criminal case. It is, of course, apparent that it is of considerable aid to a plaintiff if he can get before a jury the fact that the defendant he is suing was arrested on the spot by a police officer and taken to a jail, booked and incarcerated. And this court can well imagine what effect this testimony has upon the jury. Immediately, they surmise that he must have been drunk or he would not have been arrested and taken to jail. Yet that was the issue which the jury was to decide. They might consider that fact as the most important fact on the question of his drunkenness, namely, that the police officer, whose duty it was to enforce the law, did so by immediately arresting and incarcerating the defendant. Whether he was intoxicated or not was a disputed question, and credible disinterested witnesses testified that he was sober. Others testified that he was drunk, and his arrest and incarceration may have been the very item of evidence that induced the jury to believe that he was drunk. The damages awarded are substantial, particularly when one considers the fact that the injuries which plaintiffs claimed were sharply and seriously disputed by defendant who offered testimony of two reputable and outstanding doctors on that subject (Tr. 212-242; 266-281) which directly refuted plaintiffs' more serious claims of injury.

In *Chicago City Ry. Co.* v. *Uhter,* 212 Ill. 174, which appears to be the leading Illinois Supreme Court case on this subject, a policeman who witnessed the accident and testified for the defendant, was asked by plaintiff's counsel on cross-examination facts which brought out that he took the motorman and conductor of the defendant's train which caused the injury in question into his charge or, in other words, arrested them. Objections were made and overruled, and the testimony went

to the jury. In holding this to be error the Supreme Court of Illinois through Mr. Justice Magruder, said (p. 182):

> "This evidence in regard to the arrest was improperly admitted by the trial court. There was no charge of wilful and wanton conduct on the part of the motorman and conductor in the declaration, but only a charge of ordinary negligence on the part of the company. The admission of this evidence tended to make the impression upon the minds of the jury, that the motorman and conductor had been guilty of committing an act, which was criminal in its nature, and as the verdict of the jury, before its reduction by a *remittitur,* was $12,500.00, it may be that the jury came to the conclusion, in view of this evidence, that they had a right to award punitive damages."

It might be argued that this case is not in point for the reason that in the case at bar there is a charge of wilful and wanton misconduct. We know of no rule permitting the evidence when there is a charge of wilful and wanton misconduct, but, on the contrary, if the defendant in the case at bar had been convicted of a charge of driving his car while under the influence of liquor, such conviction would not have been admissible. This is borne out by *Cammerano* v. *Gimino,* 234 Ill. App. 556, which was an action for assault and battery of which malice is peculiarly the gist. In that case plaintiff offered in evidence a record of the conviction of the defendant in a criminal prosecution—for the same assault and battery. The First District considered the matter thoroughly (see p. 559 of opinion, *et seq.*) and concluded that the admission of this criminal record constituted reversible error. It was the only point decided by the court, and while it is an Appellate Court opinion, as distinguished from a Supreme Court opinion, nevertheless it was the duty of the trial court and Cir-

cuit Court of Appeals to follow it under the doctrine of *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, decided December 9, 1940, wherein this court held that it was the duty of the Federal courts under the *Erie* case to follow the decision of the intermediate Appellate state court,—there an opinion of the Court of Appeals of Ohio.

Chicago City Ry. Co. v. *Uhter*, 212 Ill. 174, cites as authority for its holding *Luby* v. *Hudson River Railroad Co.*, 17 N. Y. 131, which was an action for damages as a result of plaintiff being struck by one of defendant's cars while crossing a street in the City of New York. On the trial, evidence was allowed to be given by a police officer, against the objection of the defendant that he arrested the driver of the car. The Court of Appeals held that the fact of the arrest was irrelevant and may have improperly influenced the jury in their judgment, reversing the case, and saying (p. 132):

> "In regard to the arrest. That fact was irrelevant to the case, and we cannot tell what influence it may have had upon the minds of the jury. It is true that the jury ought not to attach any importance to the circumstances in trying the issue before them, but this only proves that this fact ought not to have been shown for their consideration. It certainly has some tendency to prove that at the very time of the transaction the defendant's driver was considered by the officer and others as guilty of culpable negligence. The question of his negligence was in issue and on trial; and how far the jury were aided in their conclusion by the manner in which the driver was treated by a police officer or others who witnessed or were near the transaction, it is impossible for us to say. There is no pretense for saying that this evidence was necessary or proper, for the purpose of identifying the occasion."

Likewise in the case at bar there is no pretense for saying that this evidence was necessary or proper for the purpose of identifying the occasion. The witness Smith had already testified that in his opinion the defendant was intoxicated before any testimony was elicited from him to the effect that he arrested the defendant and took him to jail. The witness Crawford could have testified that he saw the defendant on the day in question and that, in his opinion, the defendant was drunk without any reference to the place where he saw him or without any reference to the fact that he was booked on a charge of driving a car while intoxicated. The evidence that he was bound over to the grand jury, that capias was issued for his arrest, and information filed by the State's Attorney, and that he was required to furnish bond was no evidence of his intoxication. It would not even be evidence in a criminal case.

Neither may it be said that there has been a waiver of the point. While it is true that the defendant did attempt to counteract this prejudicial and inadmissible testimony introduced by the plaintiff, he had a right to do so. The plaintiffs were attempting to leave the inference that the prosecutions were still pending and that the defendant was still to be punished, thereby corroborating the constable's and deputy sheriff's opinion as to the propriety of criminal action. The fact was that there were no criminal prosecutions pending and that the defendant had never been convicted. Certainly he had a right to show this. The trial court made the issue when he overruled repeated objections to evidence relating to the defendant's arrest and subsequent incarceration. The rule is well settled that a party has a right to meet a plaintiff's case as made under the rulings of the trial court and after making the objection has a right to combat the testimony whether cor-

rectly admitted or not without losing any right on appeal. *Chicago City Ry. Co.* v. *Uhter,* 212 Ill. 174, 181

In that case the trial court permitted the plaintiff to offer over the objection of the defendant evidence of witnesses to the effect that they had never heard of the plaintiff having certain ailments prior to the time of his injury. Thereupon defendant asked some of his witnesses questions of the same character, and it was argued on appeal that defendant had waived its origina objection to the admission of this evidence by introduc ing evidence of the same character. In holding tha defendant did not waive its objection the Supreme Cour of Illinois, quoting from a Texas case, said on page 181

> "It is contended, however, that after the admis sion of the objectionable evidence, defendant also offered proof upon the matter, and is, therefore estopped to complain. We do not think this conten tion sound. A defendant has the right to meet th plaintiff's case, as made under the rulings of th trial judge, and, after making objection and reserv ing proper exceptions, may combat the testimon of plaintiff, whether correctly admitted or not without losing his rights on appeal."

To the same effect are *Teter* v. *Spooner,* 279 Ill. 39, 4 47; *Winn* v. *Christian Co. Coal Co.,* 156 Ill. App. 17 182; *Phila. Rap. Tran. Co.* v. *Coast Fir & Cedar Pro Co.,* 241 Ill. App. 320, 326; and *Warszawa* v. *White Eag Brewing Co.,* 299 Ill. App. 509, 516.

There is only one Appellate Court case in the Stat of Illinois which is not in line with the other Suprem and Appellate Court decisions. This is the case *Chicago City Ry. Co.* v. *Reddig,* 139 Ill. App. 160, whic contains a statement that evidence of arrest is prope However, the point was not presented and is not di cussed by the court and is pure *dictum.* The real hol ing in that case was that after a showing is made of a

arrest it is error to exclude the reason therefor. It cites *Chicago City Ry. Co.* v. *Uhter,* 212 Ill. 174, and states as its essential holding, that unless the reason for the arrest is permitted, the evidence of arrest would be calculated to leave an impression in the minds of the jury that there was something culpable in the conduct of the person arrested at the time of the accident which brought it about. In other words, in that case the reason for the arrest was permitted in order to get away from the possibility that a jury would infer blame on the person arrested. It is the very point which we have been contending for and which the other cases announce as well, that the issue of culpability is to be determined by the jury in the civil case and not by a police officer on the scene of the accident.

Moreover, the *Reddig* case was decided in 1908 by the First District Appellate Court of Illinois and was followed in 1924 in the same district by *Cammerano* v. *Gimino,* 234 Ill. App. 556, referred to above herein, an exhaustive opinion on the subject which decided only the point in issue. If any question existed with respect to the meaning of the opinion in the *Reddig* case, that question has been eliminated by the later opinion by the same court.

Therefore there can be no question of the law in the State of Illinois with respect to the admissibility of evidence of arrest of a party involved in an accident, in an action growing out of the accident. Such evidence is definitely not admissible in Illinois, and we respectfully submit that the admission of this testimony had a prejudicial effect on the defendant's case on the issue of his intoxication and constitutes reversible error, and the decision of the Circuit Court of Appeals holding such evidence to be admissible is in conflict with the local applicable decisions.

CONCLUSION.

This court has frequently held that even the guilty are entitled to a fair trial in accordance with the established law and the procedure of our courts. Time after time this court has stated that there is not one rule of procedure for the innocent and another for the guilty.

An examination of the record in this case cannot fail to disclose the undue prominence which was given to the issue of the defendant's drunkenness and the evidence of the details of his arrest, incarceration and partial prosecution. This issue was in reality a very minor issue in the case for the real issue was the operation of the defendant's motor vehicle. We have shown that even on the testimony of the plaintiff that operation was at a reasonable speed and in a proper manner until the rear end of his car dropped—that is, until the wheel came off. We have also shown that even the plaintiffs' complaint is drawn on the theory that the wheel coming off was the cause of the accident. The issue then becomes a question whether or not there was reasonable and adequate inspection—inspection over a period of ten days, during which time the defendant owned the car, and on the morning of the day of the accident. At these times there is no showing that the defendant was drunk at all, and of course if a failure of inspection is the basis for the judgments in this case, then the defendant's drunkenness on the scene of the accident is not even relevant or material.

What we consider to be the most important question in this case and which particularly this court ought to consider is the possibility of a calm, cold, dispassionate consideration of the issues in this case by the jury in the atmosphere of and against the background of the

defendant's immediate arrest by the constable, his incarceration by the Sheriff, his bind-over by the Justice of the Peace and prosecution by the State's Attorney. How could the jury calmly consider whether the defendant, for a period of ten days prior to this occasion, should have more carefully inspected the car? How could the jury under these circumstances carefully and dispassionately consider the facts with respect to the manner in which the defendant's car was being driven?

When added to this prejudicial background you have a blanket indictment of everyone connected with the defense, charging them with perjury, dishonesty and untruth, which, although without foundation, receives the inadvertent but apparent approval of the trial court, by the overruling of objections it becomes apparent that this is not a case where it can be said the errors were harmless.

Who can measure the effect upon the jury of such error? The injuries were very seriously questioned in this case, yet the verdicts are substantial. Who can say that it was not the prejudicial evidence of arrest and the prejudicial charge of dishonesty that were the very factors causing the verdicts? How easy for the jury to assume from the action of the officials that the defendant was drunk, and since he was in an accident while drunk he should repair the damage. How easy, in other words, for the jury in this case to accord to the issues in this case not the fair, calm, dispassionate judgment of a fair trial but the assumptions, the prejudices and the passionate feelings of "a dishonest, drunken man's" trial.

Respectfully submitted,

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